Analysis of Mark v. Moser: Determining Duty of Care Between Sports Co-Participants in Light of the Indiana Comparative Fault Statute

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I. INTRODUCTION

Imagine, for a second, what it would be like to train for and participate in a triathlon. Months of early morning swims are followed immediately by rigorous training runs. Long bike rides on the weekends replace trips to the mall and quality time with the family. Finally, after all the hard work, comes race day. Still wet from the strenuous mile swim, racers fly down the road on flashy bikes. Then, it happens. One racer too self-involved and overly concerned with winning the all important age group trophy disregards ordinary and prudent care and cuts you off causing a painful crash that results in serious injuries. Months of training down the drain, expensive bike destroyed, hospital bills adding up, this is the price paid for assuming that other weekend warriors participating in “fun” triathlon events will exercise reasonable care. And who pays for the bike and for the medical bills? If the race was in Indiana and if the racer was only negligent, you pay.

This is Rebecca Mark’s story. In Mark v. Moser, Rebecca Mark suffered serious injuries that required hospitalization as a result of Kyle Moser cutting in front of her during the bike leg of a triathlon. The Indiana Court of Appeals addressed whether Rebecca’s negligence count against Kyle should survive summary judgment and proceed to a jury.

2 Id. at 413.
3 Id.
makes this case unique is that no Indiana case has specifically addressed this duty issue since the state's adoption of the Comparative Fault Act.\(^4\) In rejecting negligence, the court concluded that the Act left sports participants especially vulnerable to personal injury tort suits and, therefore, in order to afford them extra protection the Act's principals do not apply to this class of defendants.\(^5\) Instead, the court applied an implied primary assumption of risk doctrine and concluded that Rebecca was barred from recovering on a negligence claim because she assumed the inherent and foreseeable risks of the sport\(^6\) and because other jurisdictions have rejected the negligence standard.\(^7\)

This casenote will argue that based on the state of the law in Indiana with the adoption of the Comparative Fault Act, the court should have permitted Rebecca's negligence count to proceed to a jury. First, the doctrine of implied primary assumption of risk should not have been applied as a complete defense because all total bar defenses were eliminated through the Comparative Fault Act. Second, the court should not have disregarded the Comparative Fault Act because courts cannot generally impose common law exceptions on statutes. Finally, the court relied on other jurisdictions that had rejected negligence as the proper standard, however, it failed to recognize a distinction between states with codified comparative fault schemes and those without.

In its analysis of *Mark v. Moser*, this casenote will first provide background information, discussing defenses generally, standards of care generally, and the current state of the law in Indiana. Part III provides the facts, procedural history, and decision of *Mark*. Part IV analyzes the Indiana Court of Appeals decision. Finally, Part V discusses the potential impact the *Mark* decision may have.

\(^4\) *Id.*
\(^5\) *Mark*, 746 N.E.2d 410 at 421.
\(^6\) *Id.* at 419.
\(^7\) *Id.* at 416-19.
II. BACKGROUND

Unquestionably, participants in recreational sports are bound to experience accidents and injuries in their quest for athletic glory. However, a difficult question that has created a division among varying jurisdictions is how and where to draw the line between what is permissible competitive behavior, which results in simple accidents and what is impermissible competitive behavior, which results in lawsuit instigating injuries. An important consideration that has influenced what standard of care a court adopts is whether the state in which the court resides permits implied assumption of risk as a complete defense, or whether the state has merged this doctrine into a comparative negligence statute. Courts, which

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8 There has been disagreement among jurisdictions as to whether an athlete has a legal obligation to avoid negligent conduct, or if the duty of care is lower, such as recklessness or intentional misconduct. Compare Babych v. McRae, 567 A.2d 1269 (Conn. Super. Ct. 1989) (applying negligence standard to injury in professional hockey game); Lavine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977) (applying negligence standard to injury in collision between snow skiers); Gray v. Houlton, 671 P.2d 443 (Colo. Ct. App. 1983) (applying negligence standard to injury in collision between snow skiers); Duke’s GMC, Inc. v. Erskine 447 N.E.2d 1118 (Ind. Ct. App. 1983) (applying negligence standard to golf injury); Lestina v. West Bend Mutual Insurance Co., 501 N.W.2d 28 (Wis. 1993) (applying negligence standard to injury in soccer game), with Hoke v. Cullinan, 914 S.W.2d 335 (Ky. 1995) (applying recklessness standard to injury incurred in tennis match); Connel v. Payne, 814 S.W.2d 486 (Tex. Ct. App. 1991) (applying recklessness standard to injury in a recreational polo game); Turcotte v. Fell, 502 N.E.2d 964 (N.Y. 1986) (applying recklessness to injuries in a professional horse race); Ross v. Clouser, 637 S.W.2d 11 (Mo. 1982) (applying reckless standard to injuries in a recreational softball game).


10 See Auckenthaler v. White, 877 P.2d 1039 (Nev. 1994) (holding that in light of state’s elimination of assumption of risk through adoption of comparative negligence statute, negligence applicable to injury sustained during recreational
still permit the defense of implied assumption of risk, have generally adopted a recklessness standard of care for actions between sports participants. On the other hand, courts, which have completely subsumed the defense into a comparative negligence scheme, have adopted negligence as the proper standard of care. Finally, regardless of the assumption of risk doctrine, courts seem to uniformly agree that when a sports participant intentionally injures a co-participant he has breached a legal duty.

See supra note 9 (string cite of cases applying recklessness on basis of implied assumption of risk).

See supra note 10 (string cite of cases applying negligence in light of states' adoption of comparative fault statutes and elimination of assumption of risk doctrines).

Most courts agree that an intentional act, which injures a co-participant, constitutes a clear cause of action in tort. Raymond L. Yasser, Liability for Sports Injuries, in LAW OF PROFESSIONAL AND AMATEUR SPORTS 14.01, 2 (Gary Uberstine, ed. 1992). Therefore, this note will not discuss intentional misconduct, but rather will focus on the conflicting opinions regarding courts' application of recklessness versus negligence.
I. The Doctrine of Assumption of Risk Generally

As a general definition, the doctrine of assumption of risk means that "a plaintiff who voluntarily assumes the risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." This rule has been a source of great confusion for courts because it has been interpreted and defined in at least four different contexts. In the context of implied assumption of risk, the doctrine refers to a plaintiff who knows that he risks being harmed by defendant's conduct, who does not expressly consent to such risk, yet nevertheless manifests a willingness to accept the risk by voluntarily proceeding in the face...
of the danger. Some courts divide implied assumption of risk into two doctrines, "primary assumption of risk" and "secondary assumption of risk." 18

Primary assumption of risk generally requires the defendant to show that (1) plaintiff had full subjective understanding of the nature and presence of a specific risk; and, (2) plaintiff voluntarily chose to encounter the risk. 19 In its evaluation of these elements, the court looks at the nature of the activity, the relationship of the defendant to the activity, and the relationship of the defendant to the plaintiff. 20 If a court finds that the primary implied assumption of risk doctrine is applicable, then the defendant owes no legal duty to protect the plaintiff from the particular risk that caused the injury. 21 Therefore, because there can be no legal breach of duty, there can be no claim of negligence hence, primary implied assumption of risk remains a complete defense separate from comparative negligence. 22

Secondary implied assumption of risk requires that (1) the defendant owed a duty of care to plaintiff; and (2) that the plaintiff proceeded to encounter a known risk imposed by the defendant’s breach. 23 Jurisdictions applying secondary assumption of risk balance the party’s respective faults, which is “quintessential to comparative negligence;” 24 hence, the doctrine of secondary implied assumption of risk is subsumed by comparative negligence. 25

17 Restatement (Second) of Torts § 496A.
21 Tincani v. Inland Empire Zoological Soc’y, 875 P.2d 621, 633 (Wash. 1994) (“implied primary assumption of risk is really a principle of no duty, or no negligence, and so denies the existence of the underlying action”).
22 Foronda, 25 P.3d 826 at 836.
23 Id.
24 Id.
25 A plaintiff’s assumption of risk is unreasonable, and a form of contributory negligence, where the known risk of harm is great relative to the utility of plaintiff’s conduct. Restatement (Second) of Torts § 496 comment c. See also
2. The Doctrine of Comparative Fault Generally

Black’s Law Dictionary defines comparative negligence as, “the principle that reduces a plaintiff’s recovery proportionally to the plaintiff’s degree of fault in causing the damage, rather than barring recovery completely.”

A trend away from contributory negligence and total-bar defenses emerged at the turn of the twentieth century with the inception of comparative negligence schemes. Although comparative negligence had a slow birth, by 1976 well over half the states had adopted some form of comparative negligence, either by statute or by “judicial fiat.” Most jurisdictions which have adopted comparative negligence have done so under statutory provisions expressly imposing the doctrine. As an outgrowth of the widespread codification of the doctrine, various forms of comparative negligence have emerged.

First, some jurisdictions have enacted statutory systems of “pure” comparative negligence. The “pure” form provides “for the apportionment of damages between a negligent defendant and a contributorily negligent plaintiff, regardless of the extent to which either party’s negligence contributed to the plaintiff’s harm.”

Second, other jurisdictions have enacted statutory systems of “modified” comparative negligence. Under the “modified” system, legislatures generally employ either a “less than” variation

Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 53 (N.J. 1959);
Foronda, 25 P.3d 826 at 836.

26 BLACK'S LAW DICTIONARY 276 (7th ed. 1999).
28 Id.
29 Id.
30 Id.
32 Id.
33 Id.
or a "less than or equal to" variation.\textsuperscript{34} The "less than" variation provides that "a plaintiff's contributory negligence is not a bar to recovery if his negligence was less than that of the defendant, though the damages which the plaintiff could recover would be reduced by the degree of his negligence compared with that of the defendant, or in proportion to the plaintiff's negligence."\textsuperscript{35} The "less than or equal to" variation is identical to the "less than" variation except that the former provides that plaintiff is not barred from recovery if his contributory negligence is equal to that of the defendant.\textsuperscript{36}

3. The Indiana Comparative Fault Statute\textsuperscript{37}

Prior to 1985, Indiana courts utilized a common law contributory negligence rule.\textsuperscript{38} Contributory negligence was defined as "the failure of a person to exercise for his own safety that degree of care and caution which an ordinarily reasonable and prudent person in a similar situation would exercise."\textsuperscript{39} Under this rule, a plaintiff who was just slightly negligent could be entirely barred from recovering damages even though the defendant may have been highly culpable.\textsuperscript{40} This state of the law changed, however, with the Indiana Legislator's adoption of the state's Comparative Fault Act in 1985.\textsuperscript{41}

The Indiana Comparative Fault Act states, "any contributory fault chargeable to the claimant diminishes proportionately the

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} At this point, I will be providing background information about the Indiana Comparative Fault Act as the basis of my argument that the Indiana Court Appeals incorrectly adopted recklessness as the standard of care between co-participants in Mark v. Moser.
\textsuperscript{38} See generally Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978) (the court applies and discusses the common law contributory negligence rule).
\textsuperscript{39} Id. at 1007 (quoting Memorial Hospital of South Bend, Inc. v. Scott, 300 N.E.2d 50, 57 (Ind. 1973).
\textsuperscript{40} Haun, 379 N.E.2d 1004.
amount awarded as compensatory damages...the claimant is barred from recovery if the claimant’s fault is greater than the fault of all persons whose fault proximately contributed to the claimant’s damages.”

The Indiana judiciary has recognized that the legislative purpose for adopting the act was to “ameliorate the harshness of the then prevailing doctrine of contributory negligence.”

As applied to the Act, the term “fault” includes, “any act or omission that is negligent, willful, wanton, reckless, or intentional, toward the person or property of others.” The term also includes, “unreasonable assumption of risk not constituting enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.” Significantly, the Indiana Supreme Court has stated that under the Act:

a plaintiff’s incurred risk is considered ‘fault’ and is to be compared to other fault contributing to the accident. Thus, although at common law a plaintiff would have incurred the risk of the entire accident, under the Comparative Fault Act, the plaintiff has no longer incurred the entire risk but, theoretically, only a portion of it. Accordingly, comparing incurred risk under the Act with incurred risk at common law is a comparison of two distinct legal theories.

Three years later in *Heck v. Robey*, the Indiana Supreme Court specifically stated that incurred risk no longer survived as a complete defense because it was contrary to the state’s Comparative Fault Act. The defense does, however, survive as defense in that it may reduce or eliminate a plaintiff’s recovery depending on the apportionment of fault under the Act. Both the Indiana Supreme Court and the Indiana Court of Appeals have

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44 Ind. Code §34-6-2-45(b) (1998).
45 Ind. Code §34-6-3-45(b) (1998).
48 *Id.* at 505 n. 10.
held that the incurred risk defense is unavailable expect where a plaintiff accepts a specific risk of which he had actual knowledge. Furthermore, the court has held that the incurred risk defense, when available, is a subjective issue subject to a jury determination.

Finally, The Indiana Supreme Court has concluded that the Act eliminated not just contributory negligence, but also all other common law defenses, which entirely precludes a plaintiff's recovery.

B. Standards of Care

1. Knight v. Jewett — Recklessness

In Knight v. Jewett, the defendant and plaintiff were opponents in a game of touch football and, although the factual events leading to the injury were disputed, it was undisputed that the defendant stepped on and broke the plaintiff's finger. Plaintiff filed a negligence suit against defendant. The Supreme Court of California had to decide how to apply the assumption of risk doctrine in light of the court's adoption of comparative fault

49 See Clark v. Wiegand, 617 N.E.2d 916, 918 (Ind. 1993) ("the doctrine of incurred risk involves a subjective analysis focusing upon the plaintiff's actual knowledge and appreciation of the specific risk and voluntary acceptance of the risk"); Hopper v. Carey, 716 N.E.2d 566, 575 (Ind. Ct. App. 1999) (holding that the defense of incurred risk is only available if the plaintiff accepted a specific risk and he had more than a general knowledge of the possibility of an accident). Clark, 617 N.E.2d at 917 (the question of whether a student in a university judo class incurred risk of injury from another student was a question for the jury).


52 Recklessness is defined as, conduct whereby the actor does not desire the consequences but nevertheless foresees the possibility and consciously takes the risk; recklessness involves a greater degree of fault than negligence. Restatement (Second) of Torts § 500 (1965).


54 Id.
The court held that the implied assumption of risk doctrine had been only partially abrogated into the common law comparative fault scheme. In its reasoning, the court stated that California law recognized the division of assumption of risk into the “primary” and “secondary” categories and that primary assumption of risk continued to act as a total bar to recovery, while secondary assumption of risk had been subsumed by the comparative fault principles. In its application of the doctrine to the instant case, the court held that assumption of risk had not been completely abrogated and that it continued to act as a total bar on the plaintiff’s recovery. The court then concluded, through reliance on policy rationales established in prior case law, that a sports participant did not have a legal duty to avoid negligent conduct, which injured a co-participant. The court reasoned that because the defendant did breach a legal duty, the doctrine of primary assumption of risk was applicable and the plaintiff was barred from recovery. Hence, the common law comparative fault principles were never applied.

2. Auckenthaler v. White – Negligence

In Auckenthaler v. White, plaintiff, while participating in a recreational horseback ride, was kicked and injured by another rider’s horse. Plaintiff filed a negligence suit against both the...
rider of the horse that struck her and the owner of the horse. The Nevada Supreme Court had to determine if adopting a recklessness standard of care was appropriate in light of Nevada’s abolition of implied assumption of risk as a complete defense. In holding that negligence, and not recklessness, was the appropriate standard, the court distinguished Nevada law from California. The Nevada Supreme Court explained that California’s application of recklessness was in effect a round-about way of determining that the plaintiff assumed the risk of injury. The court reasoned that this reduced standard of care would be contrary to the Nevada negligence statute because, unlike an implied assumption of risk doctrine, comparative negligence focuses on the relative fault of each party rather than on the lack of duty on the defendant’s part. Therefore, the court concluded, “The district court erred by adopting California’s reckless or intentional standard of care. The underlying facts of this case, and all forthcoming cases, are to be examined by utilizing simple negligence rubric...we reverse the district court’s ruling and remand for further proceedings consistent with this opinion.”

C. Standard of Care in Indiana

In the past, the Indiana Court of Appeals has touched on the issue of what standard of care is owed in sport’s related injuries; however, the state Supreme Court has never specifically addressed

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66 Id.
67 Id.
68 Id. at 1041-42; see also supra text accompanying notes 58-62 discussing California’s reckless standard.
69 Id. at 1042-43.
71 Auckenthaler, 877 P.2d 1039 at 1044 (“adopting a reduced standard of care is merely another way of recognizing implied assumption of risk through the back door or by way of duty/risk principles”).
72 Id. at 1044.
73 See e.g. Duke’s GMC, Inc. v. Erskine, 447 N.E.2d 1118 (Ind. Ct. App. 1983) (applying negligence standard in injured golfer’s action against a corporation, which paid the dues of the negligent golfer).
the issue. Furthermore, no Indiana state court has addressed the issue since the adoption of the comparative fault act.

1. Webb v. Jarvis -- Determining Duty as a Matter of Law

In Webb v. Jarvis, the Indiana Supreme Court had to determine whether a physician could be held liable to a third party under a negligence claim where an unknown third party was shot by a patient whom the physician had prescribed anabolic steroids. In concluding that the defendant physician owed the unknown third party plaintiff no duty, the court announced a three-part balancing test for determining duty as a matter of law. According to the Webb opinion, courts should balance the following three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy. After applying the foregoing test to the circumstances of this particular case, the Webb court stated that while in the instant case the physician defendant owed no duty, in a changed factual setting the duty analysis could have produced a different result. Therefore, Indiana courts are required to engage in the foregoing balancing test on an ad hoc basis for any case where the defendant's duty of care is questionable.

74 The Indiana Supreme Court has, however, addressed the issue of what the applicable standard is when a sports participant sues a school or university for an injury inflicted by a co-participant. It ruled that the applicable standard is negligence. See Beckett v. Clinton Prairie Sch. Corp., 504 N.E.2d 552 (Ind. 1987) (applying negligence standard in student's action against school for injury incurred from collision between two players during basketball game); see also Clark v. Wiegand, 617 N.E.2d 916 (Ind. 1993) (applying negligence standard in student's action against university for injury inflicted by fellow classmate during judo class).
75 Mark, 746 N.E.2d 410 at 413.
77 Id. at 993.
78 Id. at 995.
79 Id.
80 Webb, 557 N.E.2d 992 at 998.

In *Duke’s GMC*, the plaintiff was participating in a round of golf when he was struck in the eye by a fellow golfer’s stray ball.[^82] As a result of this incident, plaintiff lost sight in one eye and subsequently filed suit.[^83] Rather than sue the golfer responsible for his injuries, plaintiff sued the corporation that the injury-inflicting golfer was president of and, which paid his club dues.[^84]

The Indiana Court of Appeals had to address issues concerning admission of certain evidence and disputed jury instructions.[^85] In delivering its opinion on plaintiff’s disagreement with the trial court’s incurred risk instruction, the court of appeals stated that a golfer could not incur the risk of another golfer’s negligence as a matter of law.[^86] In response to an argument that the trial court erred in instructing the jury to assume that all participants would observe the rules of the game, the court of appeals stated, “the recognized rules of a sport are indicia of the standard of care which the players owe each other. While a violation of these rules may not be negligence *per se*, it may well be evidence of negligence.”[^87] Although not specifically stated in the opinion, it appears as though the court applied a negligence standard.[^88]

[^82]: *Id.* at 1120
[^83]: *Id.*
[^84]: *Id.*
[^85]: *Id.* at 1123.
[^86]: Erksine, 447 N.E.2d at 1123.
[^87]: *Id.* at 1124.
[^88]: In fact, the court in *Mark* stated that it assumes negligence was applied in this case. *Mark*, 746 N.E.2d 410 at 416 n. 2 ("While the standard is unclear, it appears from the court’s holding and analysis of how violations of the rules of sport affect the negligence analysis, that it permitted the case to proceed under a negligence standard").
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III. MARK V. MOSER

A. Facts

On September 7, 1997, Rebecca Mark (plaintiff) and Kyle Moser (defendant) each competed in a triathlon race in Marion County, Indiana. The race consisted of three consecutive events, swimming, bicycling, and running. During the bicycle leg of the race, defendant was riding on the left side of plaintiff and cut in front of her. Consequently, the two athletes collided and plaintiff was hospitalized for serious injuries. Prior to the event, all racers were required to sign an entry form, which included an agreement to abide by the rules of the USA Triathlon organization and a release of liability waiver. Defendant was disqualified from the race for violating a USA Triathlon rule that stated: “No cyclist shall endanger himself or another participant. Any cyclist, who intentionally presents a danger to any participant or who, in the judgment of the Head referee, appears to present a danger to any participant shall be disqualified.” The referee stated that he disqualified the defendant, not because he acted intentionally, rather he was disqualified for violating the rule “because by moving over, an accident occurred.”

B. Procedural History

Plaintiff subsequently filed a two count complaint asserting first, that the collision was a result of defendant’s negligence and second, that in the alternative, defendant had acted recklessly and negligently.

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90 Id.
91 Id.
92 Id.
93 Id. The release waiver signed by the participants did not relieve the individual athletes from liability. It only acted to relieve the sponsor from liability.
94 Mark, 746 N.E.2d at 410.
95 Id.
willfully in causing her injuries. The trial court granted summary judgment for the defendant as to Count I of plaintiff’s complaint and she appealed. On appeal, the Indiana Court of Appeals had to define what standard of care one competitor owed another in a sporting event in light of Indiana’s codification of the Indiana Comparative Fault Act.

C. The Court’s Opinion

The Indiana Court of Appeals upheld the trial court’s grant of summary judgment and stated that (1) the Comparative Fault Act was inapplicable to cases involving co-participants in a sporting event; and (2) an objective primary assumption of risk doctrine is applicable. The court held that “voluntary co-participants in sports activities assume the inherent and foreseeable dangers of the activity and cannot recover for injury unless it can be established that the other participant either intentionally caused injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport.”

1. Indiana Comparative Fault Act

The court held that the Indiana Comparative Fault Act did not apply to the instant case. Under comparative fault principles, a plaintiff, whose “fault” meets the statutory definition, is allowed recovery on a basis of apportionment of fault. The court specifically acknowledged this statutory construction in its

96 Mark, 746 N.E.2d at 413.
97 Id.
98 Id.; see Ind. Code §34-51-2-5
99 Id. at 421.
100 Id. at 419.
101 Mark, 746 N.E.2d at 420.
102 Id. at 421.
103 The term fault includes, “unreasonable assumption of risk not constituting enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages” Ind. Code §34-6-3-45(b).
104 Baker, 632 N.E.2d. at 797.
opinion. Yet, despite this acknowledgement, the court nevertheless reasoned that when the Indiana legislator eliminated its common law contributory negligence principles in favor of the comparative fault act it failed to account for situations where parties are unable to protect themselves. The court reasoned that this legislative oversight left a "void in the law." According to the court, sports participants are unable to adequately protect themselves from liability, while event organizers and sponsors are afforded protection by securing waivers. Therefore, the court held that, because it is the job of the judiciary to fill voids in the law, participants in sporting events are barred as a matter of law from recovering against co-participants for injuries sustained as the result of inherent or foreseeable dangers of the sport.

2. Primary Assumption of Risk

In its analysis, the court concluded that it was necessary, as a matter of policy, for it to adopt an objective primary assumption of risk doctrine, which acts as a total bar defense. By adopting this doctrine, the court held that a jury trial should not be used to determine whether a plaintiff incurred the risk of injury inflicted by co-sports participants, rather, this determination should be made by the court as a question of law. In its determination of this question, the court stated that it looks at whether the injury-causing event was an inherent or reasonably foreseeable part of the game, such that the plaintiff manifested an assumption of risk.
Finally, the court instructed that if a plaintiff did not assume the risk, then the case should proceed to a jury on the question of whether the defendant intentionally or recklessly\textsuperscript{114} caused the injury.\textsuperscript{115} The court concluded that the district court was correct in granting the defendant summary judgment as to Count I and it remanded the case back to the trial court for Count II to determine whether the plaintiff assumed an inherent and foreseeable risk.\textsuperscript{116}

IV. ANALYSIS OF \textit{MARK v. MOSER}

The state of Indiana has taken definitive steps to eliminate unnecessarily harsh statutory and common-law defenses that impose a complete bar on a plaintiff’s recovery in personal injury tort suits. The elimination of these defenses is apparent in light of the state’s codification of the Indiana Comparative Fault Act\textsuperscript{117} and the state Supreme Court’s interpretation and usage of the Act.\textsuperscript{118} Furthermore, other jurisdictions, which have subsumed assumption of risk into comparative fault statutes, have ruled that negligence is the proper standard of care to be applied in cases involving injuries inflicted by one sports participant on another.\textsuperscript{119}

\textsuperscript{114} Notably, in its analysis of what standard of care to apply the court stated, “apart from policy rationales, some courts have justified adoption of a recklessness or intentional standard of care on the grounds that a participant in a sports activity assumes the risks inherent in that activity.” Along with this reasoning, the court stated it chose to apply a recklessness standard instead of negligence for various policy reasons, which included concerns about possible mass tort litigation, a chilling effect on sports, and a decrease in the intensity with which athletes would participate. \textit{Id. at 418-21}. Although each of these policy rationales can be disputed, they are not the focus of this Note. For a recent Case Note that argues against these policy rationales see Mark M. Rembish, \textit{Liability for Personal Injuries Sustained in Sporting Events After Jaworski v. Kiernan}, 18 \textit{QUINNIAC L. REV.} 307 (Summer 1998).

\textsuperscript{115} \textit{Mark}, 746 N.E.2d at 419.

\textsuperscript{116} \textit{Id. at 414}.

\textsuperscript{117} Indiana Comparative Fault Act, Ind. Code §34-51-2-5 through -6.

\textsuperscript{118} \textit{Heck}, 659 N.E.2d at 505 (Ind. 1995) (holding that the Comparative Fault Act eliminated all complete defenses to a plaintiff’s recovery).

\textsuperscript{119} See supra note 10 for a string cite of cases applying negligence standard in light of states’ adoption of comparative fault statutes.
It appears, therefore, that the Indiana Court of Appeals incorrectly decided *Mark v. Moser* by applying primary implied assumption of risk\(^\text{120}\) in a blatant disregard of the Indiana Comparative Fault Act\(^\text{121}\) and by rejecting negligence as the proper standard of care.\(^\text{122}\)

**A. The Indiana Court of Appeals Was Incorrect in Applying Primary Assumption of Risk as a Complete Defense**

The Indiana Court of Appeals incorrectly applied the doctrine of implied primary assumption of risk.\(^\text{123}\) The court was wrong in its holding because the Indiana Supreme Court has ruled that the Act’s definition of “fault” eliminated all defenses, which impose a total ban on a plaintiff’s recovery.\(^\text{124}\) The Indiana Supreme Court has stated that, “any rule that purports to effect an absolute defense based upon incurred risk is contrary to our comparative fault scheme.”\(^\text{125}\) Furthermore, the state’s high court has concluded that the incurred risk defense exists as a partial defense and that it requires a jury to subjectively address the issue by balancing the party’s respective degrees of fault.\(^\text{126}\)

The court of appeals’ holding in *Mark* fails to give any credence to the clear language of the Act or to the state’s high court’s interpretation of it. Rather, the court of appeals reaches a conclusion, which is directly contrary to the Act. The court’s holding in *Mark* stated that in suits between co-participants, whether the injury causing event was reasonably foreseeable, and thus an incurred risk, is a question of law for the courts to

\(^{120}\) *Mark*, 746 N.E.2d at 419.

\(^{121}\) *Id.* at 421.

\(^{122}\) *Id.*

\(^{123}\) *Id.* at 419.

\(^{124}\) *Heck*, 659 N.E.2d at 505; *see also supra* text accompanying notes 42-51 discussing the Indiana Legislator’s definition of the term “fault” in the Comparative Fault Act and Indiana Supreme Court decisions interpreting the term.

\(^{125}\) *Id.*

\(^{126}\) *Id.*
If the court answers this inquiry in the affirmative, then plaintiffs are barred from recovery. This holding clearly constitutes a rule that "purports to affect an absolute defense based upon incurred risk." Despite the obvious inconsistency in the adoption of this rule and the state Supreme Court's admonition of it, the court of appeals nevertheless decided that plaintiffs injured during recreational sports activities are excluded from enjoying rights granted by the Indiana Supreme Court under the Act. The court of appeals weakly stated that, "as a matter of policy, we prefer to avoid the need to hold a jury trial to determine whether the plaintiff incurred the risk of injury in every case involving a sports injury caused by a co-participant. We can prevent this necessity by adopting an objective primary assumption of risk doctrine and a standard of care greater than negligence." However, the court of appeals failed to state clearly and directly what its "policy" reasons were for why it would "prefer" to effectively disregard well-established law. Amazingly, the court of appeals comes to this conclusion despite the fact that the Indiana Supreme Court has reversed the appellate court's use of implied primary assumption of risk in the past. In

127 Mark, 746 N.E.2d at 419; see also supra text accompanying notes 111-116 discussing court's conclusion that an objective primary implied assumption of risk doctrine should be used.
128 Id.
129 The rule announced in Mark that a plaintiff suing a co-participant can be completely barred from recovery on the basis of incurred risk is precisely the rule that the state Supreme Court found repugnant to the Comparative Fault Act. Heck, 659 N.E.2d at 505.
130 Id. at 505; See also supra note. 118 (discussing elimination of total bar defenses).
131 Mark, 746 N.E.2d at 420 (emphasis added).
132 The court discusses various policy reasons throughout its opinion for why negligence should not be adopted as the proper standard of care between sports participants. see supra note 114. However, these policy reasons in no way advance, or purport to advance, an argument that a jury trial should not be used. Rather, these policy arguments assert that negligence would have an adverse affect on sports and would fail to adequately protect defendants. The court, therefore, fails to advance any policy rationales asserting legitimate reasons for denying plaintiffs in sports injury suits a jury trial.
133 Heck, 659 N.E.2d at 505.
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Heck v. Robey, Justice Shelby of the Indiana Supreme Court stated, “In other jurisdictions primary assumption of risk may be either express or implied. We reject this primary-assumption-of-risk terminology to the extent that it suggests that a lack of duty may stem from a plaintiff’s incurred risk. Under the Act, a plaintiff may relieve a defendant of what would otherwise be his or her duty to the plaintiff only by express consent.”\(^{134}\) A rule, therefore, purporting to impose an absolute bar on a negligently injured sports participant’s right to recover on the suggested basis that the participant impliedly assumed the risk through voluntary participation is inconsistent with Indiana law as interpreted by the state Supreme Court. Yet, this is exactly the rule announced by the court of appeals in *Mark.*\(^{135}\)

In a footnote in his *Heck* opinion, Justice Shelby backpedaled slightly and stated “the court may determine on other grounds that no duty exists based upon ‘(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy.’”\(^{136}\) Therefore, it is plausible that the court of appeals could have engaged in an analysis in which it applied this three part test and concluded that for reasons comporting with precedent the defendant in *Mark* did not owe a duty to the plaintiff. However, it did not engage in such an analysis.\(^{137}\) In fact, the court never even cited the foregoing test or the case in which it originated.\(^{138}\) Furthermore, even if the court had engaged in such an analysis, it would nevertheless be incorrect in announcing a bright line rule that in *all* recreational activities a sports participant never has a duty to refrain from acting negligently with regard to a fellow participant.\(^{139}\) Such a rule is contrary to the balancing test

\(^{134}\) *Id.*

\(^{135}\) *Mark,* 746 N.E.2d at 421; *See also supra* text accompanying notes 111-116.

\(^{136}\) *Heck,* 659 N.E.2d at 505, n.11.

\(^{137}\) *See generally Mark.*

\(^{138}\) *See generally Mark; see also* Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991) (holding that a court should balance the following three factors in determining if a duty is owed: (1) relationship between the parties, (2) reasonable foreseeability of harm to the person injured, and (3) public policy concerns).

\(^{139}\) *Mark,* 746 N.E.2d 410 at 420; *see also supra* text accompanying note 101.
announced in *Webb*.\textsuperscript{140}

Just prior to announcing the three part balancing test, the *Webb* court stated, "whether, the law recognizes any obligation on the part of a particular defendant to conform his conduct to a certain standard for the benefit of a plaintiff is a question of law."\textsuperscript{141} Apparently, the *Webb* court intended courts to balance these factors for the particular parties in each case where the question of what, if any, legal duty is owed. Nowhere in its opinion in *Mark* did the court of appeals engage in this balancing test. Rather, when it announced that negligence should not be applied to this class of cases it relied on rebuttable policy arguments advanced by other jurisdictions and on its own preference for having courts rather than juries decide the issue of incurred risk.\textsuperscript{142} In reaching this conclusion, the court not only acted in a blatant disregard for the Indiana Supreme Court's ruling in *Webb*,\textsuperscript{143} but it also disregarded the state Supreme Court's decision in *Clark*.\textsuperscript{144}

Thus, the only legitimate means by which the court of appeals could have concluded that the plaintiff was barred as a matter of law from recovering damages on a negligence basis would have been to apply the specific facts and circumstances of the case to the three part *Webb* balancing test and conclude that this particular defendant's duty did not rise to the level of negligence. The court's application of the implied primary assumption of risk doctrine was, therefore, an illegitimate means for concluding that the plaintiff was barred as a matter of law from recovering under her negligence count.

\textsuperscript{140} See *Webb*, 575 N.E.2d at 995 (in announcing three part test, court seems to suggest that courts should balances factors on an ad hoc basis, rather than pronouncing generally that an entire class of defendants is free from owing an entire class of plaintiffs a certain duty of care); See also supra text accompanying note 80.

\textsuperscript{141} Id. (emphasis added).

\textsuperscript{142} *Mark*, 746 N.E.2d at 419; see also supra text accompanying notes 111-114.

\textsuperscript{143} See generally *Webb*, 575 N.E.2d at 992; see also supra text accompanying notes 79-81.

\textsuperscript{144} *Clark*, 617 N.E.2d at 917 (stating the issue of incurred risk is a subjective inquiry for the jury).
B. The Indiana Comparative Negligence Act

The court was incorrect in upholding summary judgment for Count I of plaintiff's complaint because it ignored the legislative purpose and language of the Comparative Fault Act and because it ignored the judicial interpretation of the Act. The clear legislative purpose of the Indiana Comparative Fault Act was to obviate the severity of the effects of the common-law contributory negligence scheme.\(^{145}\) Under the old contributory negligence principles a plaintiff who was negligent, even just slightly negligent, could not recover anything in an action against the tortuous defendant.\(^ {146}\) Recognizing the harshness of this rule, the state legislator followed the path of over half the states\(^ {147} \) and enacted a comparative fault scheme.\(^ {148} \) This modified "less than or equal to" scheme\(^ {149} \) instructs courts to apportion the respective "faults" of the parties.\(^ {150} \) The Act expressly defines "fault" as, "any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others."\(^ {151} \) Thus, through the codification of the Act, the legislator has expressly and unmistakably enacted a change in the common law whereby the focus is on the relative fault of the parties and any rule completely eliminating a plaintiff's ability to recover damages is disfavored.

In its opinion in Mark, the court of appeals acknowledges the legislative purpose, it acknowledges the wording and effect of the Act,\(^ {152} \) and then it turns its back to the legislature and to the common law and declares that liability is not triggered by negligent acts and that the implied primary assumption of risk

\(^{145}\) Baker, 632 N.E.2d at 797.

\(^{146}\) See supra text accompanying notes 38-40.

\(^{147}\) See supra text accompanying note 28.

\(^{148}\) See supra note 41.

\(^{149}\) See supra text accompanying note 36 defining "less than or equal to" form of comparative negligence

\(^{150}\) See supra text accompanying note 42 reciting the Indiana Comparative Fault Act.

\(^{151}\) Ind. Code §34-6-2-45(b) (1998).

\(^{152}\) Mark, 746 N.E.2d at 414.
doctrine acts as a complete bar to plaintiff’s recovery. What happened to “ameliorating the harshness of contributory negligence?” What happened to apportioning fault? Apparently, sports participants are a special kind of plaintiff not worthy of the same statutory protections as other plaintiffs. The court declares that because sport’s participants are unable to adequately protect themselves by securing waivers or release of liability forms prior to competition it is the job of the judiciary to provide these potential defendants with greater protection than the Comparative Fault Act provides. This declaration is at direct odds with the language and purpose of the Indiana Comparative Fault Act.

In cases where the Comparative Fault Act is applicable, the courts are required to allow a jury to award a plaintiff damages based on an apportionment of the parties respective faults. The legislative definition of fault for purposes of the Act expressly includes negligence. The Indiana legislator clearly intended to eliminate situations in which a plaintiff is barred from any recovery and this intent has been expressly recognized by the state Supreme Court. A claim that the plaintiff in bears some amount of responsibility or fault through her voluntary participation invokes the Act and necessitates a jury determination of damages based on each party’s fault. Therefore, any court correctly applying the Comparative Fault Act to the case would submit the plaintiff’s negligence count to a jury for a determination of damages based on allocation of fault. The Indiana Court of Appeals, however, decided summary judgment was appropriate.

Apparentl, the court of appeals does not dispute that, if correctly applied, the comparative fault act would have required denying defendant’s motion for summary judgment. Rather than dispute this point, the court of appeals stated that:

153 Id. at 420; see also supra text accompanying note 111.
154 Baker, 632 N.E.2d at 797.
155 Mark, 746 N.E.2d at 421; see also supra text accompanying notes 108-110.
156 See supra text accompanying notes 42-50.
157 Ind. Code §34-6-2-45(b) (1998); See also supra text accompanying note 44.
158 See supra text accompanying notes 42-50.
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When our legislator abandoned contributory negligence as a total bar to recovery and established a comparative fault regime, it did not account for situations where parties are unable to protect themselves from liability. Thus there is a void in the law. We recognize that one of the responsibilities of the judiciary is to fill such voids. Accordingly, we determine that, as a matter of law, participants in sporting events will not be permitted to recover against their co-participants for injuries sustained as the result of the inherent or foreseeable dangers of the sport.¹⁵⁹

In its announcement of this “void filling” function,¹⁶⁰ the court of appeals does not cite any authority granting it the power to create common law exceptions to clearly drafted statutes. Perhaps the court failed to provide such authority because it has been an established rule in Indiana since 1887 that when the words of a statute are unambiguous and its purpose is clear, courts do not have the power to create exceptions to statutes.¹⁶¹ Furthermore, the Indiana Supreme Court has stated that because the Act is in “derogation of the exiting common law” it must be construed strictly.¹⁶² Therefore, the court of appeals had an obligation to strictly construe and follow the Comparative Fault Act, which would require the court to allow plaintiff’s negligence count to go to a jury.

¹⁵⁹ Mark, 746 N.E.2d at 421.
¹⁶⁰ In engaging in this “void filling” the court of appeals is essentially applying incurred risk as a total bar on plaintiff’s ability to recover as a matter of law. Such a rule is directly contrary to the Act and the common law interpretation/application of the Act. See supra text accompanying notes 42-50.
¹⁶¹ Eastman v. State, 10 N.E. 97, 99 (Ind. 1887) (stating, “...the [judiciary’s] authority to create exceptions is one to be exercise with great delicacy. It can never be exercised where the words of the statute are free from ambiguity, and its purpose plain”).
C. Precedent Supports Negligence Standard

In reaching its conclusion that negligence is not the proper standard of care, the *Mark* court stated that the question of what obligation a sports participant owes a co-participant had not been directly addressed in Indiana and, therefore, it relied on policy arguments advanced by other jurisdictions. Apparenty, the appropriate method for determining what duty of care a defendant owes a plaintiff is the application of the *Webb* balancing test. However, even assuming that the court of appeals could have decided what standard of care was applicable without applying the *Webb* test, precedent supports adoption of negligence, not recklessness. While it is true that the duty of care question with regard to sports co-participants has not been directly and decisively ruled on in Indiana, the state’s case law on similar issues suggests that negligence is the proper standard of care. Furthermore, the law in other jurisdictions clearly supports an argument that in states that have codified a comparative fault scheme, negligence is the proper standard of care.

1. Indiana Case Law

The Indiana Supreme Court has applied a negligence standard in civil suits involving injuries inflicted on a sports participant by a co-participant. The court of appeals distinguished its decision in *Mark* on the basis that the plaintiffs in the foregoing cases were suing a school or university and not the injury-inflicting co-participant. According to the court of appeals reasoning, a negligence standard is applicable in suits against a school and not a co-participant because, “there is a well established duty on the part of such institutions and their personnel to exercise ordinary and

164 *Webb*, 575 N.E.2d at 992; see also *supra* text accompanying notes 77-80.
165 See *supra* notes 73-74.
166 See generally Auckenthaler; see also *supra* text accompanying notes 65-72.
167 See *supra* note 74.
168 *Mark*, 746 N.E.2d at 419.
reasonable care for the safety of those under their authority, however, no such analogous authority or responsibility exists between co-participants."\textsuperscript{169} Concededly the duty question is significantly different when the defendant is a school; however, the court appears to be incorrect in its pronouncement that "no such analogous authority or responsibility exists between co-participants."\textsuperscript{170}

In Duke's GMC, it appears that the Indiana Court of Appeals allowed a negligence claim to be brought by an injured golfer against the injury-inflicting golfer's corporation.\textsuperscript{171} The Mark court acknowledged the apparent use of negligence when it stated, "while the standard is unclear, it appears from the court's holding and analysis of how violations of the rules of sport affect the negligence analysis, that it permitted the case to proceed under a negligence standard."\textsuperscript{172} Therefore, while the case law on the question of duty between co-participants may not be as well-established as the duty imposed on schools, it does suggest that the court be receptive to negligence claims. The Mark court handled this discrepancy with a one line statement in a footnote that, "to the extent Duke's GMC is inconsistent with this opinion it is disapproved."\textsuperscript{173} The court ignored and disapproved the state of the law in Indiana on the basis of arguments advanced by courts in other jurisdictions.\textsuperscript{174} What the court either fails to recognize or acknowledge is that many jurisdictions which have adopted a comparative fault scheme permit negligence claims between co-participants.\textsuperscript{175}

2. The Law in Other Jurisdictions

The court in Mark cites numerous cases from a variety of

\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} See generally Duke's GMC; see also supra note 88.
\textsuperscript{172} Mark, 746 N.E.2d at 416 n. 2; see also supra note 88.
\textsuperscript{173} Mark, 746 N.E.2d at 420 n. 5.
\textsuperscript{174} Id. at 416-19.
\textsuperscript{175} See generally Auckenthaler; see also supra text accompanying notes 65-72.
jurisdictions in reaching its conclusion that negligence should not be the applicable standard in personal injury suits between sports participants.\textsuperscript{176} In relying on these foreign cases, the court focuses on not just policy rationales, but also on the rationale that some of these courts have justified rejecting negligence on the basis of assumed risk.\textsuperscript{177} To the extent the court relies on these foreign jurisdictions, it is wrong.

Specifically, the court cites a California case, \textit{Knight v. Jewett}, in support of the argument that negligence was inappropriate because “risk of injury is a common and inherent aspect of sports and recreational activity.”\textsuperscript{178} In \textit{Knight}, the court engaged in a lengthy analysis of the state of the law in California and concluded that because implied primary assumption of risk survived as a total defense in that state, the plaintiff was barred from recovery.\textsuperscript{179} In \textit{Auckenthaler v. White}, a Nevada case, the Nevada Supreme Court adopted negligence as the proper standard of care in personal injury sports suits and explicitly distinguished California law from Nevada law on the basis of comparative negligence.\textsuperscript{180} In reference to California’s adoption of a standard of care lower than negligence, the Nevada court stated that, “adopting a reduced standard of care is merely another way of recognizing implied assumption of risk through the back door or by way of duty/risk principles.”\textsuperscript{181} The court further explained its adoption of negligence by stating that under the Nevada comparative fault law, the focus should be on the relative fault of each party and not on the lack of duty on the defendant’s part.\textsuperscript{182} Because the state of the law in Indiana regarding assumption of risk and comparative fault is more comparable to Nevada than California,\textsuperscript{183} the court should have applied the reasoning of \textit{Auckenthaler} rather than \textit{Knight}. In

\textsuperscript{176} \textit{Mark}, 746 N.E.2d at 416-19.
\textsuperscript{177} \textit{Id.} at 418; see also supra note 114.
\textsuperscript{178} \textit{Mark}, 746 N.E.2d at 418-19.
\textsuperscript{179} See generally \textit{Knight}; see also supra text accompanying notes 57-62.
\textsuperscript{180} See generally \textit{Auckenthaler}; see also supra text accompanying notes 65-72.
\textsuperscript{181} \textit{Auckenthaler}, 877 P.2d at 1044; see also supra note 71.
\textsuperscript{182} See generally \textit{Auckenthaler}; see also supra text accompanying notes 65-72.
\textsuperscript{183} In both Indiana and Nevada comparative fault principles have been codified, whereas, in California they have not; see supra note 70.
so doing, the court should have concluded that on the basis of the Comparative Fault Act it would be proper to apply a negligence standard to an analysis of each of the party’s relative fault.

V. IMPACT

The court’s decision in Mark v. Moser looks very much like a usurpation of power and the court seems to be acting more like a super legislator than a court of appeals. The danger in this result is that it essentially tells courts in Indiana that they are free to disregard unambiguous statutes with clear legislative purposes. Now, any time justices of a court have “preferences” that may be contrary to a statutory scheme they can rely on Mark and simply state that the legislator left a “void in the law” and create exceptions in accord with their preferences.

The legislator is supposed to be the voice of the people. Citizens engage in the political processes of lobbying and voting to ensure that legislation reflects the preferred policy of the majority of people of the state. By creating a common law exception to a clearly written and interpreted statute, the court of appeals overstepped its judicial boundaries at the expense of any person choosing to participate in recreational athletic events in Indiana. If these athletes believe that the Comparative Fault Act has rendered them exceptionally vulnerable to personal injury suits, then they have political means whereby they can encourage the legislator to amend the law. Allowing a panel of justices to amend the law, however, replaces the voice of the majority with the voice of a few judges. Such a result flies in the face of our nation’s democratic process.

Another potential impact of the Mark decision is that it seems to suggest courts may ignore well-established law. The main focus of the Mark decision was on whether or not the defendant’s legal duty could be judged according to negligence principles. The Indiana Supreme Court has announced a clear three-part balancing

\(^{184}\) See generally Mark.
test for courts to use when a question of legal duty arises. Rather than use this three-part test, the court of appeals relied solely on policy arguments and on an improper use of the implied primary assumption of risk doctrine. The decision could, therefore, cause confusion as to what the proper means for determining legal duty of care is and it could also encourage future courts to depart from established law with no explanation.

VI. CONCLUSION

The Indiana Court of Appeals incorrectly decided Mark v. Moser. First, the court’s decision wrongfully applied an implied primary assumption of risk doctrine as a complete defense. By announcing that sports participants are barred from recovering any damages for negligence claims on the basis that they assume the inherent and foreseeable dangers of the sport, the court ignored the clear wording of the Comparative Fault Act as well as the state Supreme Court’s interpretation of it. In declaring the defendant in Mark did not have an obligation to refrain from negligent conduct, it should have employed the Webb balancing test and kept its decision refined to the factual circumstances of the case.

Second, the court’s decision wrongfully created a common law exception to the Indiana Comparative Fault Act. In announcing that because the Act left a “void” in the law any defendants sued for inflicting injuries on co-participants are exempted from the Act’s elimination of total bar defenses, the court of appeals overstepped its judicial power. The Act has clear wording and a clear purpose. The court of appeals acknowledges this in its Mark decision. Therefore, in accordance with the law of Indiana, it was an improper use of judicial power to create an exception to the Act.

Finally, the court’s reliance on other jurisdictions is tenuous. When it relied on other jurisdictions, the court failed to take into account the important distinction between states that have codified comparative fault statutes, and those that have not. Because

185 Webb, 575 N.E.2d at 992; see also supra text accompanying notes 77-80.
foreign jurisdictions are divided on the duty issue, had the court taken this distinction into account it would have found persuasive arguments for imposing a negligence duty.

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